

Consumer Mortgage Coalition

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Re: Loans in Areas Having Special Flood Hazards – Private Flood Insurance

Dear Sirs or Madam:

The Consumer Mortgage Coalition (“CMC”), a trade association of national mortgage lenders, servicers, and service providers, appreciates the opportunity to comment on the interagency proposal regarding private flood insurance. Five agencies (hereafter the “Agencies”) join in this rulemaking, designed to implement the private flood insurance provisions of the Biggert-Waters Flood Insurance Reform Act of 2012 (“Biggert-Waters”

or the “Biggert-Waters Act”).¹ Specifically, the proposed rule would implement a Biggert-Waters provision regarding private flood insurance policies to satisfy a flood insurance purchase mandate (“Purchase Mandate”).

This Purchase Mandate, for purposes of this letter, is a requirement that entities the Agencies regulate not “make, increase, extend, or renew any loan secured by improved real estate or a mobile home” in a special flood hazard area (“SFHA”) if flood insurance is available under the National Flood Insurance Program (“NFIP”) unless the collateral is covered by flood insurance for the term of the loan, up to the lesser of the loan balance or the available NFIP coverage.²

The Biggert-Waters Act requires lenders to accept private insurance to meet the Purchase Mandate only if the private insurance approximates the standard flood insurance policy (“SFIP”) that the Federal Emergency Management Agency (“FEMA”) makes available as part of the NFIP. In practice, it has proven difficult to determine whether a private policy meets the Biggert-Waters definition of private flood insurance. This rulemaking is designed to address those determinations.

The CMC has long supported private flood insurance. We must note that this rulemaking has two characteristics that do not often occur together in the same rulemaking. First, federal statutes tightly constrain the Agencies’ discretion. Second, the Agencies are grappling with ingrained tensions in our nation’s flood policy objectives. We appreciate the Agencies’ efforts to attempt to make progress under these difficult circumstances.

We support the following flood policy objectives:

- Property owners should have flood insurance options, including the option of purchasing private flood insurance, consistent with safety and soundness.
- Federal and local flood policies should be to prevent and mitigate neighborhood blight.
- Flood hazard areas should be mapped as expeditiously as possible, and maps should be updated as needed. As this letter describes, study of flood-prone areas has been federal policy for nearly a century, yet most of the country remains unmapped. This means people are unknowingly developing and occupying areas that are prone to flood, causing unnecessary and avoidable risk of death, injury, and property damage. Policymakers should consider having FEMA contract out its mapping function if that would help reach the goal sooner or at less cost.

¹ The Biggert-Waters Act was enacted as part of the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012). More specifically the Biggert-Waters Act is in Division F, Title II, Subtitle A of the larger statute, at §§ 100201 – 100249, 126 Stat. 916 – 969.

² 42 U.S.C. § 4012a(b)(1)(A).

- Mortgage investors, lenders, and servicers should be permitted to require flood insurance policies to be sufficient, including: coverage of appropriate perils; reasonable deductibles, exclusions, and conditions; including the lender or servicer as an additional loss payee; and the ability to reject insurers that lack sufficient claims-paying ability.
- Floodplain management practices should remain in place, whether flood insurance is federal or private.
- FEMA should have adequate funding to carry out its functions.

Flood insurance is only one aspect of flood policies in this country. Floodplain management and flood hazard mapping are also central to flood policies nationwide. By design, the different aspects of flood policies are intertwined. A Congressional finding in the National Flood Insurance Act of 1968 (“NFIA”)³ is that:

“the objectives of a flood insurance program should be integrally related to a unified national program for flood plain management[.]”⁴

Flood policies use subsidized flood insurance as an incentive to encourage communities to participate in the NFIP. That participation requires communities to adopt and enforce floodplain management and flood mitigation practices to reduce flood damages. In addition, some of the fees for SFIPs fund floodplain management and flood mitigation activities. Because these different policies are intertwined, we urge the Agencies, working with FEMA, to consider flood policies broadly in this rulemaking, rather than considering private flood insurance in isolation. If private flood insurance were to become widespread, Congress would need to adopt an alternative incentive for communities to participate in the NFIP, and Congress would need to replace the funding that SFIPs today provide for FEMA flood programs.

The NFIP will require Congressional reauthorization next year. This presents a timely opportunity to address flood policies generally. This is also an opportunity to ensure that there are sufficient funds for robust flood hazard mapping. We urge the Agencies to work with Congress during the reauthorization debate to ensure that that sound flood policies, including flood insurance, floodplain management, and flood hazard mapping are in place so that blighted neighborhoods are avoided.

³ Title XIII of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 572.

⁴ *Id.* § 1302(c), 82 Stat. at 573. This remains current law, 42 U.S.C. § 4001(c).

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I. OVERVIEW

As an attempt to work within the statutory constraints the Agencies face, this proposal has two essential aspects. First, it would provide a compliance aid to help identify when a private flood insurance policy meets the Biggert-Waters definition of private flood insurance. Second, it would permit mortgage lenders and servicers to meet the Purchase Mandate by accepting private flood insurance policies that do not meet the Biggert-Waters definition on a discretionary basis and subject to certain restrictions. The restrictions are similar to the Biggert-Waters definition of private flood insurance, but the proposal would provide lenders and servicers leeway to avoid parts of the statutory definition of private flood insurance.

We strongly support private flood insurance, but we must object to any federal policy that would result in neighborhood blight. This rulemaking looks at flood insurance in isolation although flood policies in this country are integrally related, and would affect the incentive structure underlying flood policy objectives but does not analyze how it would do so. We believe that analysis is critical to avoid neighborhood blight. We therefore include in this letter a background on flood policies generally, including a description of how the different aspects are related.

This year, the House of Representatives passed [H.R. 2901](#) to amend the Biggert-Waters Act, and this bill similarly addresses flood insurance in isolation. The bill would require Fannie Mae and Freddie Mac (the “GSEs”) and federal agency lenders to accept private insurance with narrower coverage than SFIPs. Unfortunately, this would indirectly result in neighborhood blight: (1) private insurance might not provide enough protection to rebuild properties after a flood; (2) if private insurance were widespread, communities would lose existing incentives to participate in the NFIP, meaning they would have reduced incentives to adopt and enforce floodplain management and flood mitigation practices; and (3) if private flood insurance were widespread, FEMA would be less able to fund its flood programs, including programs other than insurance, such as floodplain management and mapping. These results would make flood damages worse, undermine significant aspects of the NFIP, and cause neighborhood blight.

The Agencies’ proposed discretionary acceptance of private insurance has several protections that are absent from H.R. 2901, including a proposed requirement that private policies name the mortgage servicer as a loss payee, and have reasonable deductibles, exclusions, and conditions. Another helpful aspect of this proposal is that investors, lenders, and servicers would have discretion to reject private flood insurance policies that they determine lack sufficient protection, which we strongly support.

We encourage the agencies to review its proposal in the context of flood policies broadly to avoid unintended consequences.

II. HISTORY of FLOOD POLICIES in AMERICA

Floods can cause widespread devastation, taking lives and destroying properties over large areas simultaneously. Floods occur repeatedly, and yet with little notice of where or when they will hit. Floods can have multiple causes, including hurricanes, rainfall and melting snow, and infrastructure failures, making them difficult to predict.

The federal, state, and local governments in this country have always contended with floods. Congress over the years has created carefully aligned incentives that encourage activities that reduce flooding in populated areas, that prevent development in flood-prone areas, and that minimize future damage after a flood. This history will demonstrate how flood insurance is one, but only one, aspect of our nation's flood policies. Other aspects are intertwined with flood insurance, and need to be considered together.

Notably, Congress has addressed the need to study flood-prone areas repeatedly over many decades, yet today much of the country remains unmapped. This is unfortunate because it means development can unknowingly occur in areas that have flood risks. Building in flood-prone areas increases both the risk and the extent of flood damage.

A. Early Flood Laws

1. 1917 – First Act to Provide for Flood Control

The first major federal legislation by which Congress involved itself in flood mitigation was enacted in 1917.⁵ Congress authorized up to \$45 million for flood control along the Mississippi River, and for surveys to determine the cost of flood control.⁶ It also authorized funds for levee construction and repair on the Mississippi River, on the condition that all rights of way be provided free of cost to the federal government.⁷ The law also authorized up to \$5.6 million for flood control, debris removal, and “for the rectification and enlargement of river channels and the construction of weirs” on the Sacramento River.⁸ The funds could be used for levees on the condition that California bear half of the cost.⁹ Again, Congress required that the federal government would not pay for rights of way.¹⁰ The law also called for “a comprehensive study of the watershed

⁵ Act of March 1, 1917, ch. 144, 39 Stat. 948. Old Statutes at Large are available [here](#).

⁶ *Id.* and para. (a); 39 Stat. at 948.

⁷ *Id.* paras. (b) and (d); 39 Stat. at 948 – 49.

⁸ *Id.* § 2, 39 Stat. at 949.

⁹ *Id.* § 2(a), 39 Stat. at 949 – 50.

¹⁰ *Id.* § 2(b), 39 Stat. at 950.

or watersheds,” with a report to be published and submitted to Congress.¹¹ These early approaches to flood mitigation, study of flood-prone areas and federal assistance, continue as central aspects of flood policy today.

2. *1928 – Flood Control on the Mississippi River*

In 1928, Congress authorized \$325 million for surveys between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, for floodways, spillways, diversion channels, and levee improvements, with the states responsible for maintaining the flood-control works.¹² Where levees were impracticable on the Mississippi River, the law authorized the federal government to purchase land subject to flooding or floodage rights over the land.¹³ The law authorized funding for mapping “in furtherance of this project.”¹⁴ It called for surveys of the Mississippi River “as speedily as practicable,” with studies on how flood control could be attained by reservoirs, flood control in the Mississippi Valley through forestry,¹⁵ and the effects of overflow on the side of the river opposite levees.¹⁶ The policy was flood mitigation with federal funding, and, again, Congress called for mapping of flood-prone areas.

3. *1933 – Tennessee Valley Authority*

In 1933, Congress created the Tennessee Valley Authority (“TVA”) and authorized it, among other things, to implement flood control measures “to control destructive flood waters in the in the Tennessee River and Mississippi River basins[.]”¹⁷ This was additional federal assistance for flood control.

4. *1934 – Reconstruction Finance Corporation Loans*

In 1934, Congress authorized the Reconstruction Finance Corporation to finance up to \$5 million for “the acquisition of home or building sites in replacement of sites formerly occupied by buildings where such sites are declared by public authority to be unsafe by

¹¹ *Id.* § 3, 39 Stat. at 950 – 51.

¹² Act of May 15, 1928, ch. 569, 45 Stat. 534.

¹³ *Id.* § 3, 45 Stat. at 536.

¹⁴ *Id.* § 5, 45 Stat. at 536.

¹⁵ *Id.* § 10, 45 Stat. at 538.

¹⁶ *Id.* § 11, 45 Stat. at 538.

¹⁷ Tennessee Valley Authority Act of 1933, ch. 32, 48 Stat. 58.

reason of flood, danger of flood, or earthquake” and to finance drainage and flood control systems.”¹⁸

5. *1936 – Flood Control Act of 1938*

Two years later, Congress declared the following policy:

“It is hereby recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected.”¹⁹

The Flood Control Act of 1936 authorized \$310 million²⁰ for a long list of flood improvement projects,²¹ to be maintained by the states,²² and another \$10 million for examinations and surveys.²³ It tasked the Corps of Engineers with “Federal investigations and improvements of rivers and other waterways” and tasked the Agriculture Department with “Federal investigations of watersheds and measures for run-off and waterflow retardation and soil erosion prevention on watersheds[.]”²⁴ This was a strong declaration of the need for flood mitigation and, again, for examinations and surveys of flood-prone areas. These policy objectives remain central to the nation’s flood policy today.

¹⁸ Act of April 13, 1934, ch. 121, 48 Stat. 589.

¹⁹ Flood Control Act of 1936, ch. 688, § 1, 49 Stat. 1570.

²⁰ *Id.* § 9, 49 Stat. at 1596.

²¹ *Id.* § 5, 49 Stat. at 1572 – 92.

²² *Id.* § 3(c), 49 Stat. at 1571.

²³ *Id.* § 9, 49 Stat. at 1596 – 97.

²⁴ *Id.* § 2, 49 Stat. at 1570.

6. *1950 – Federal Disaster Assistance*

After World War II, Congress enacted a disaster relief law, stating:

“it is the intent of Congress to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate suffering and damage resulting from major disasters, to repair essential public facilities in major disasters, and to foster the development of such State and local organizations and plans to cope with major disasters as may be necessary.”²⁵

This law authorized \$5 million for its purposes.²⁶

7. *1954 – Watershed Protection and Flood Prevention Act*

In 1954, Congress declared:

“That erosion, floodwater, and sediment damages in the watersheds of the rivers and streams of the United States, causing loss of life and damage to property, constitute a menace to the national welfare; and that it is the sense of Congress that the Federal Government should cooperate with States and their political subdivisions, soil or water conservation districts, flood prevention or control districts, and other local public agencies for the purpose of preventing such damages and of furthering the conservation, development, utilization, and disposal of water and thereby of preserving and protecting the Nation’s land and water resources.”²⁷

This law authorized works of improvement for flood prevention and agriculture in watershed or subwatershed areas not exceeding two hundred and fifty thousand acres.²⁸ It tasked the Agriculture Department, upon state request, with conducting investigations and surveys, to determine the soundness and a cost-benefit analysis of plans for improvement, and to enter into agreements with local organizations, and to provide federal assistance.²⁹ This law authorized the agriculture Department, in cooperation with other Federal agencies and with States and local agencies, to make investigations and surveys of the watersheds of rivers and other waterways as a basis for the development of

²⁵ Act of September 30, 1950, ch. 1125, 64 Stat. 1109.

²⁶ *Id.* § 8, 64 Stat. at 1111.

²⁷ Watershed Protection and Flood Prevention Act, ch. 656, 68 Stat. 666 (1954).

²⁸ *Id.* § 2, 68 Stat. at 666 and § 4, 68 Stat. at 667.

²⁹ *Id.* § 3, 68 Stat. at 666.

coordinated programs.³⁰

8. *1955 – Examinations and Surveys*

In reaction to hurricanes on the eastern seaboard, Congress acted again to require “an examination and survey to be made of the eastern and southern seaboard of the United States with respect to hurricanes, with particular reference to areas where severe damages have occurred.”³¹ This survey was to include “data on the behavior and frequency of hurricanes, and the determination of methods of forecasting their paths and improving warning services, and of possible means of preventing loss of human lives and damages to property, with due consideration of the economics of proposed breakwaters, seawalls, dikes, dams, and other structures, warning services, or other measures which might be required.”³² Congress wanted additional ability to predict where hazards were likely to occur.

9. *1956 – Attempted Flood Insurance*

Finding flood insurance unavailable, Congress tried to create a federal flood insurance program in 1956.³³ Congress never appropriated funds for this program, so it was not implemented.³⁴ Nevertheless, it is instructive because it set a model for flood insurance policies today. As with flood insurance today, the 1956 program was designed to be an “adjunct” to complement, rather than to replace, preventive and protective measures:

“The Congress finds that in the case of recurring natural disasters, including recurring floods, insurance protection against individual and public loss is not always practically available through private or public sources. With specific reference to insurance against flood loss, the Congress finds that insurance against certain losses resulting from this peril is not so available. Since preventive and protective means and structures against the effects of these disasters can never wholly anticipate the geographic incidence and infinite variety of the destructive aspects of these forces, the Congress finds that the safeguards of insurance are a necessary adjunct of preventive and protective means and structures.”³⁵

³⁰ *Id.* § 6, 68 Stat. at 668.

³¹ Act of June 15, 1955, ch. 140, 69 Stat. 132.

³² *Id.* § 2.

³³ Federal Flood Insurance Act of 1956, ch. 1025, 70 Stat. 1078.

³⁴ “In 1956 Congress passed the Federal Flood Insurance Act, but failed to appropriate funds for the administration of the Act because there were not adequate mitigation measures to reduce the incidence of flood damage.” S. Rep. 93-583 (1973) (accompanying the Flood Disaster Protection Act of 1973).

³⁵ Federal Flood Insurance Act of 1956, § 2(a), 70 Stat. 1078.

One of the purposes of this program was “to encourage private insurance companies to write insurance covering the extent of the risks above [\$10,000 per policy for property insurance and \$250,000 per person] and to provide Federal reinsurance to the extent desirable and necessary to carry out this purpose.”³⁶ As today, premiums would not be fully actuarial. An Administrator would set “estimated rates” for premiums that would be sufficient to pay claims “over a reasonable period of years” and the insurance cost would not be less than 60 percent of the “estimated rates[.]”³⁷ At the same time, Congress directed the Administrator to design costs to “achieve marketability[.]”³⁸ As the premiums would not necessarily cover the cost of claims, Congress authorized the Administrator to borrow \$500 million from the Treasury.³⁹

No insurance or federal loans were permitted for a property in violation of state or local flood zoning laws.⁴⁰ In addition, insurance or loans required the property’s locality to have adopted and kept in effect zoning restrictions that the Administrator deemed necessary “to reduce, within practicable limits, damages from flood in such location.”⁴¹ Incentives to comply with flood laws are a critical aspect of flood policies today.

10. Flood Control Act of 1960

The Flood Control Act of 1960⁴² provided, among other things, for identification of areas subject to floods:

“[I]n recognition of the increasing use and development of the flood plains of the rivers of the United States and of the need for information on flood hazards to serve as a guide to such development, and as a basis for avoiding future flood hazards by regulation of use by States and municipalities, the Secretary of the Army, through the Chief of Engineers, Department of the Army, is hereby authorized to compile and disseminate information on floods and flood damages, including identification of areas subject to inundation by floods of various magnitudes and frequencies, and general criteria for guidance in the use of flood plain areas; and to provide engineering advice to local interests for their use in planning to ameliorate the flood hazard[.]”⁴³

³⁶ *Id.* § 2(b)(2).

³⁷ *Id.* § 7(a), 70 Stat. at 1080.

³⁸ *Id.*

³⁹ *Id.* § 15(e), 70 Stat. at 1084.

⁴⁰ *Id.* § 12(b), 70 Stat. at 1082.

⁴¹ *Id.* § 12(c).

⁴² Title II of Pub. L. No. 86-645, 74 Stat. 480, 488, given a short title in § 212, 74 Stat. at 502.

⁴³ *Id.* § 206(a), 74 Stat. at 500.

It authorized \$1 million annually for this purpose.⁴⁴

B. National Flood Insurance Act of 1968

The NFIA created the NFIP. The NFIA is based on Congressional findings and purposes that remain current law unamended:

“(a) The Congress finds that (1) from time to time flood disasters have created personal hardships and economic distress which have required unforeseen disaster relief measures and have placed an increasing burden on the Nation’s resources; (2) despite the installation of preventive and protective works and the adoption of other public programs designed to reduce losses caused by flood damage, these methods have not been sufficient to protect adequately against growing exposure to future flood losses; (3) as a matter of national policy, a reasonable method of sharing the risk of flood losses is through a program of flood insurance which can complement and encourage preventive and protective measures[.]”⁴⁵

“(c) Congress further finds that . . . ***the objectives of a flood insurance program should be integrally related to a unified national program for flood plain management[.]***”⁴⁶

* * *

“It is the further purpose of this title to (1) ***encourage*** State and local governments to make ***appropriate land use adjustments*** to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, (2) guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards, (3) encourage lending and credit institutions, as a matter of national policy, to assist in furthering the objectives of the flood insurance program, (4) assure that any Federal assistance provided under the program will be related closely to all flood-related programs and activities of the Federal Government”⁴⁷

Since 1968, at the beginning of national flood insurance, federal policy has been that federal flood insurance is “***integrally related to a unified national program for flood plain management[.]***” One of the purposes of the NFIA is and has always been to “***encourage . . . appropriate land use adjustments***” to minimize flood damage. It is therefore important, when the Agencies impact federal flood insurance, to consider the integration of flood insurance with floodplain management policies, and to consider how

⁴⁴ *Id.* § 206(b), 74 Stat. at 500.

⁴⁵ NFIA § 1302(a), 82 Stat. at 572-73. This remains current law, 42 U.S.C. § 4001(a).

⁴⁶ *Id.* § 1302(c), 82 Stat. at 573 (emphasis added). This remains current law, 42 U.S.C. § 4001(c).

⁴⁷ *Id.* § 1302(e), 82 Stat. at 573 (emphasis added). This remains current law, 42 U.S.C. § 4001(e).

expanding private insurance could reduce community incentives to maintain sound floodplain management practices and could increase neighborhood blight.

1. Mapping as a Priority

Identifying flood-prone areas was an NFIA priority. The NFIA required the Department of Housing and Urban Development (“HUD”), in consultation with several federal, state, and local agencies, to:

“(1) identify and publish information with respect to all flood plain areas, including coastal areas located in the United States, which have special flood hazards, within five years following the date of the enactment of this Act, and (2) establish flood-risk zones in all such areas, and make estimates with respect to the rates of probable flood-caused loss for the various flood-risk zones for each of these areas, within fifteen years following such date.”⁴⁸

2. Criteria for Land Management and Use

Congress required HUD to study existing flood controls, including related laws, and to develop “comprehensive criteria” to improve long-range land management and use of flood-prone areas, as follows. Congress authorized HUD to investigate:

“the adequacy of State and local measures in flood-prone areas as to land management and use, flood control, flood zoning, and flood damage prevention[.]”⁴⁹

These investigations were to include, but not be limited to:

“laws, regulations, or ordinances relating to encroachments and obstructions on stream channels and floodways, the orderly development and use of flood plains of rivers or streams, floodway encroachment lines, and flood plain zoning, building codes, building permits, and subdivision or other building restrictions.”⁵⁰

⁴⁸ *Id.* § 1360, 82 Stat. at 587.

⁴⁹ *Id.* § 1361(a) 82 Stat. at 587.

⁵⁰ *Id.* § 1361(b) 82 Stat. at 587.

Congress required HUD to:

“develop comprehensive criteria designed to encourage, where necessary, the adoption of permanent State and local measures which, to the maximum extent feasible, will–

(1) constrict the development of land which is exposed to flood damage where appropriate,

(2) guide the development of proposed construction away from locations which are threatened by flood hazards,

(3) assist in reducing damage caused by floods, and

(4) otherwise improve the long-range land management and use of flood-prone areas,

and he shall work closely with and provide any necessary technical assistance to State, interstate, and local governmental agencies, to encourage the application of such criteria and the adoption and enforcement of such measures.”⁵¹

3. *The NFIP Is Based on Incentives*

The NFIP does not require state and local governments to adopt or enforce flood prevention or mitigation measures even though they are critical. Nor does it require all property owners in flood-prone areas to purchase flood insurance. The NFIP is based on incentives.

Congress limited flood insurance availability to qualified communities that have:

“(1) evidenced a positive interest in securing flood insurance coverage under the flood insurance program, and

(2) given satisfactory assurance that by June 30, 1970, permanent land use and control measures will have been adopted for the State or area (or subdivision) which are consistent with the comprehensive criteria for land management and use developed under section 1361, and that the application and enforcement of such measures will commence as soon as technical information on floodways and on controlling flood elevations is available.”⁵²

More specifically, a “positive interest” and “satisfactory assurance” were not enough. Within communities that were eligible for insurance under the NFIP, new NFIP flood insurance coverage was permissible after June 30, 1970 only in areas where an appropriate public body has adopted “permanent land use and control measures (with effective enforcement provisions) which the Secretary finds are consistent with the

⁵¹ *Id.* § 1361(c) 82 Stat. at 587.

⁵² *Id.* § 1305(c), 82 Stat. at 574. Congress extended this June 30, 1970 deadline by 18 months in 1969.

comprehensive criteria for land management and use under section 1361.”⁵³ Congress prohibited new insurance in areas that are “in violation of State or local laws, regulations, or ordinances which are intended to discourage or otherwise restrict land development or occupancy in flood-prone areas.”⁵⁴

That is, Congress used federal flood insurance availability as an incentive for localities to undertake land use measures to prevent flood damages. The land use restrictions can be costly, but the NFIP incentives were designed to outweigh the costs of adopting sensible land use measures. By participating in the NFIP, communities could enable their residents to avail themselves of the NFIA’s subsidized flood insurance. The subsidy, with the potential loss of federal disaster assistance for losses that could have been covered by the insurance, is an incentive for citizens to encourage their local authorities to participate in the NFIP.

These incentives remain a critical aspect of federal flood policies today. If private flood insurance were widely available, the incentives for communities to participate in the NFIP’s floodplain management would need to be replaced with alternative incentives.

4. *How the NFIA Subsidizes Flood Insurance*

The NFIA flood insurance subsidy is explicit. The NFIA required HUD, first, to estimate “risk premium rates” on an actuarial basis, and, second, to estimate and set by regulation lower “chargeable” rates that encourage purchase of flood insurance.

First, HUD was to estimate actuarial “risk premium rates”:

- “(a) [HUD] . . . shall from time to time estimate, on an area, subdivision, or other appropriate basis—
 - (1) the risk premium rates for flood insurance which—
 - (A) based on consideration of the risk involved and accepted actuarial principles, and
 - (B) including—
 - (i) the applicable operating costs and allowances set forth in the schedules prescribed under section 1311 and reflected in such rates, and
 - (ii) any administrative expenses (or portion of such expenses) of carrying out the flood insurance program which, in his discretion, should properly be reflected in such rates,
- would be required in order to make such insurance available on an actuarial basis for

⁵³ *Id.* § 1315, 82 Stat. at 580. Congress extended this June 30, 1970 deadline by 18 months, and replaced the word “permanent” with “adequate” land use and control measures, in 1969, as described below.

⁵⁴ *Id.* § 1316, 82 Stat. at 580.

any types and classes of properties for which insurance coverage is available”⁵⁵

Second, the NFIA required HUD to estimate:

“the rates, if less than the [risk premium] rates estimated under paragraph (1) [above], which would be reasonable, would encourage prospective insureds to purchase flood insurance, and would be consistent with the purposes of this title[.]”⁵⁶

These lower premiums are the “chargeable” premiums, as set by regulation:

“On the basis of estimates made under section 1307 and such other information as may be necessary, the Secretary shall . . . prescribe by regulation—
(1) chargeable premium rates for any types and classes of properties for which insurance coverage shall be available under section 1305 (at less than the estimated risk premium rates under section 1307(a)(1), where necessary)”⁵⁷

“(b) Such [chargeable] rates shall, insofar as practicable, be—

(1) based on a consideration of the respective risks involved, including differences in risks due to land use measures, floodproofing, flood forecasting, and similar measures.

(2) adequate, on the basis of accepted actuarial principles, to provide reserves for anticipated losses, or, if less than such amount, consistent with the objective of making flood insurance available where necessary at reasonable rates so as to encourage prospective insureds to purchase such insurance and with the purposes of this title, and

(3) stated so as to reflect the basis for such rates, including the differences (if any) between the estimated risk premium rates under section 1307(a)(1) and the estimated rates under section 1307(a)(2).”⁵⁸

Moreover, Congress did not require reserves to cover all losses. Rather, § 1308(b)(2) above was, and is today, explicit that the reserves were to cover “anticipated losses, or [] less than such amount” but not more than that amount. That is, Congress made insurance available at reasonable rates to encourage purchase, even though rates had to be subsidized.

As described below, the Biggert-Waters generally reduced NFIP subsidies, but Congress

⁵⁵ *Id.* § 1307(a)(1), 82 Stat. at 576, today at 42 U.S.C. § 4014(a).

⁵⁶ *Id.* § 1307(a)(2), 82 Stat. at 576, today at 42 U.S.C. § 4014(a)(2).

⁵⁷ *Id.* § 1308(a), 82 Stat. at 576, today at 42 U.S.C. § 4015(a).

⁵⁸ *Id.* § 1308(b), 82 Stat. at 577, today at 42 U.S.C. § 4015(b).

restored them less than two years later. Federal law today subsidizes federal flood insurance.

5. *Borrowing From Treasury*

Additionally making the subsidy explicit, the program was designed to rely on Congressional appropriations.⁵⁹ The NFIA repealed most of the 1956 flood insurance statute, but it did not repeal § 15(e),⁶⁰ which authorized the Administrator to borrow from Treasury. The NFIA transferred this authority to HUD.⁶¹ Section 15(e) of the 1956 law had Treasury set the interest rate, and capped borrowing at \$500 million, although the President could increase the cap. The 1968 law amended this to require Treasury to set the rate at a market rate,⁶² and capped the borrowing at \$250 million.⁶³

This insurance subsidy was unavailable for properties built in special flood hazard areas – if construction or substantial improvement of a property began after the property was identified as in an SFHA, the chargeable rate had to be at least the estimated risk premium rate, rather than at the lower chargeable rate.⁶⁴ This incentive was designed to promote sensible land use.

6. *NFIA Cost Controls*

The insurance subsidy was available for single-family homes for coverage up to \$17,500 (\$30,000 if the property had more than one dwelling unit).⁶⁵ In addition, Congress capped the total amount of flood insurance outstanding at \$2.5 billion.⁶⁶

⁵⁹ *Id.* § 1310(b)(3) 82 Stat. at 578 (Congressional appropriations to be deposited into a National Flood Insurance Fund at Treasury), today at 42 U.S.C. § 4017(b)(3); and § 1376(a) 82 Stat. at 589 (authorizing appropriations to carry out Title XIII), today at 42 U.S.C. § 4127(a).

⁶⁰ Federal Flood Insurance Act of 1956, § 15(e), 70 Stat. at 1084, today at 42 U.S.C. § 2414(e).

⁶¹ NFIA § 1309(a), 82 Stat. at 577, today at 42 U.S.C. § 4016.

⁶² *Id.* § 1303(a)(1), 82 Stat. at 573.

⁶³ *Id.* § 1309(a), 82 Stat. at 577.

⁶⁴ *Id.* § 1308(c), 82 Stat. at 577.

⁶⁵ Insurance coverage on single-family residential properties in excess of \$17,500 per single family dwelling, or \$30,000 if it contained more than one dwelling unit, required the premiums to be no less than the estimated premium rates, *i.e.*, insurance coverage below these caps was subsidized. NFIA § 1306(b), 82 Stat. at 575.

⁶⁶ NFIA § 1319, 82 Stat. at 581.

C. 1969 NFIA Amendments to Promote and Expand Subsidized Insurance

The NFIA incentives proved insufficient, and Congress quickly acted to make them more attractive.

1. Emergency NFIP Implementation

Congress enacted a provision “for the purpose of providing flood insurance coverage at the earliest possible time” and before the end of 1971.⁶⁷ Congress required HUD to establish flood insurance premiums “without regard to any estimated risk premium rates which would otherwise be determined under section 1307[.]”⁶⁸ That is, insurance would be available although HUD had not estimated actuarial risk premium rates as originally intended.

Congress also provided communities additional time to adopt local flood control measures.

- Congress provided an additional 18 months for communities to provide HUD with the NFIA § 1305(c)(2) “satisfactory assurance” that they would adopt permanent land management criteria, originally required by June 30, 1970.⁶⁹
- Congress similarly extended by 18 months the NFIA § 1315 prohibition on new insurance policies after June 30, 1970, in communities that had sufficient permanent land use and control measures.⁷⁰ Congress also replaced the section 1315 and section 1361(c) requirement that these measures be “permanent” with the requirement that they be “adequate”.⁷¹

2. Mudslides as a New Covered Peril

In the same law, Congress also extended the NFIP’s covered perils to include mudslides:

The Congress also finds that (1) the damage and loss which results from mudslides is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2)

⁶⁷ Housing and Urban Development Act of 1969, Pub. L. No. 91-152, sec. 408, 83 Stat. 379, 396 – 97, adding NFIA § 1336(a), today at 42 U.S.C. § 4056. Congress incorporated by reference into this provision the date that is in 42 U.S.C. § 4026. This is the date by which the NFIP will need reauthorization, currently September 30, 2017.

⁶⁸ *Id.* sec. 408, 83 Stat. at 397, adding NFIA § 1336(b).

⁶⁹ *Id.* sec. 410(a), 83 Stat. at 397, amending NFIA § 1305(c)(2).

⁷⁰ *Id.* sec. 410(b)(1), 83 Stat. at 397, amending NFIA § 1315.

⁷¹ *Id.* sec. 410(b)(2) and (c), 83 Stat. at 397, amending NFIA § 1315 and § 1361(c).

the problems involved in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program, are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this title to make available, by means of the methods, procedures, and instrumentalities which are otherwise established or available under this title for purposes of the flood insurance program, protection against damage and loss resulting from mudslides that are caused by accumulations of water on or under the ground.”⁷²

Congress did so by adding mudslides to the NFIA definition of flood:

“The term ‘flood’ shall also include inundation from mudslides which are caused by accumulations of water on or under the ground; and all of the provisions of this title shall apply with respect to such mudslides in the same manner and to the same extent as with respect to floods described in paragraph (1), subject to and in accordance with such regulations, modifying the provisions of this title (including the provisions relating to land management and use) to the extent necessary to insure that they can be effectively so applied, as the Secretary may prescribe to achieve (with respect to such mudslides) the purposes of this title and the objectives of the program.”⁷³

D. The Flood Disaster Protection Act of 1973 Expanded NFIA Policies

Congress again enacted major flood legislation in the Flood Disaster Protection Act of 1973 (“FDPA”).⁷⁴ Congress set out finding and purposes as follows:

“(a) The Congress finds that—
(1) annual losses throughout the nation from floods and mudslides are increasing at an alarming rate, largely as a result of the accelerating development of, and concentration of population in, areas of flood and mudslide hazards;
(2) the availability of Federal loans, grants, guaranties, insurance, and other forms of financial assistance are often determining factors in the utilization of land and the location and construction of public and of private industrial, commercial, and residential facilities;
(3) property acquired or constructed with grants or other Federal assistance may be exposed to risk of loss through floods, thus frustrating the purpose for which such assistance was extended;

⁷² *Id.* sec. 409(a), 83 Stat. at 397, adding NFIA § 1302(f).

⁷³ *Id.* sec. 409(b), 83 Stat. at 397, adding NFIA § 1370(b).

⁷⁴ Pub. L. No. 93-234, 87 Stat. 975.

- (4) Federal instrumentalities insure or otherwise provide financial protection to banking and credit institutions whose assets include a substantial number of mortgage loans and other indebtedness secured by property exposed to loss and damage from floods and mudslides;
- (5) the Nation cannot afford the tragic losses of life caused annually by flood occurrences, nor the increasing losses of property suffered by flood victims, most of whom are still inadequately compensated despite the provision of costly disaster relief benefits; and
- (6) it is in the public interest for persons already living in flood-prone areas to have both an opportunity to purchase flood insurance and access to more adequate limits of coverage so that they will be indemnified for their losses in the event of future flood disasters.

(b) The purpose of this Act, therefore, is to—

- (1) substantially increase the limits of coverage authorized under the national flood insurance program;
- (2) provide for the expeditious identification of, and the dissemination of information concerning, flood-prone areas;
- (3) require States or local communities, as a condition of future Federal financial assistance, to participate in the flood insurance program and to adopt adequate flood plain ordinances with effective enforcement provisions consistent with Federal standards to reduce or avoid future flood losses; and
- (4) require the purchase of flood insurance by property owners who are being assisted by Federal programs or by federally supervised, regulated, or insured agencies or institutions in the acquisition or improvement of land or facilities located or to be located in identified areas having special flood hazards.”⁷⁵

1. Purchase Mandate

The FDPA introduced the Purchase Mandate, with two aspects:

- Federal agencies are prohibited from approving financial assistance for acquisition or construction of property in an SFHA if NFIP flood insurance is available unless the property is insured, for the economic or useful life of the project, to the lesser of the development cost (less land value) or the maximum NFIP coverage available.⁷⁶
- Certain federal agencies must direct institutions they regulate not to make, increase, extend, or renew a loan on real property or a mobile home in an SFHA if NFIP flood insurance is available unless the property is insured for the term of the

⁷⁵ *Id.* § 2, 87 Stat. at 975-76.

⁷⁶ *Id.* § 102(a), 87 Stat. at 978.

loan by flood insurance up to the lesser of the loan amount or the maximum NFIP coverage available.⁷⁷

2. *Incentives for NFIP Participation*

The FDPA provided incentives for communities in SFHAs to participate in the NFIP. Participation enabled the community to access federal assistance, including mortgage loans from federally regulated lenders.

- Financial assistance for the acquisition or construction of property in an SFHA is prohibited unless the community participates in the NFIP.⁷⁸
- Certain federal agencies are required to prohibit financial institutions they regulate from “making increasing, extending, or renewing” loans on real estate or mobile homes in special flood hazard areas unless the community participates in the NFIP.⁷⁹

Congress required notice to affected communities. Congress required HUD to identify all flood plain areas that have special flood hazards within six months, rather than within five years as under the NFIA.⁸⁰ HUD was to notify each known flood-prone community that was not participating in the NFIP about its flood hazards.⁸¹ A community with special flood hazards could either apply to participate in the NFIP or establish that it is not seriously flood-prone or that it has corrected its hazards through floodworks or other flood control methods.⁸² This also applies to communities that later are identified as having special flood hazard areas.⁸³

3. *New Construction at Estimated Premium Rates*

The FDPA amended NFIA § 1308(c), which required flood insurance at the more expensive estimated risk premium rates for new construction or substantial property improvements on properties in special flood hazard areas. Under the NFIA, this went into effect only after HUD had identified whether the property was in an SFHA,⁸⁴ which

⁷⁷ *Id.* § 102(b), 87 Stat. at 978.

⁷⁸ *Id.* § 202(a), 87 Stat. at 982.

⁷⁹ *Id.* § 202(b), 87 Stat. at 982. Congress amended this in 1977, as described below.

⁸⁰ *Id.* sec. 201(a), 87 Stat. at 982, referencing NFIA § 1360(1).

⁸¹ *Id.* § 201(a), 87 Stat. at 982.

⁸² *Id.* § 201(b), 87 Stat. at 982.

⁸³ *Id.* § 201(c), 87 Stat. at 982.

⁸⁴ NFIA § 1308(c), 82 Stat. at 577.

was to have been within five years of the NFIA's enactment.⁸⁵ Congress enacted the FDPA just over five years after the NFIA. The FDPA amended this to apply the estimated risk premium rates to new construction on the later of December 31, 1974 [one year after the FDPA's enactment] or when the property is determined to be in an SFHA.⁸⁶

4. *Expedited Mapping*

The FDPA required HUD “to accelerate the identification of risk zones within flood-prone and mudslide-prone areas . . . in order to make known the degree of hazard within each such zone at the earliest possible date.”⁸⁷ Several agencies, and all “Federal agencies engaged in the identification or delineation of flood-risk zones shall, in consultation with the Secretary, give the highest practicable priority in the allocation of available manpower and other available resources to the identification and mapping of flood hazard areas and flood-risk zones in order to assist the Secretary to meet the deadline established by this section.”⁸⁸

5. *Increased Subsidized Coverage*

The FDPA increased the amount of subsidized flood insurance coverage. Under the NFIA, subsidized premiums were only available for single-family properties up to \$17,500 (\$30,000 if it contained more than one dwelling unit). The FDPA increased these to \$35,000 per single-family dwelling, or \$100,000 if it contained more than one dwelling unit. In Alaska, Hawaii, the Virgin Islands, and Guam, the caps increased to \$50,000 per single-family dwelling, or \$150,000 if it contained more than one dwelling unit.⁸⁹

6. *Community Notice*

The law required HUD to consult with local officials regarding “notification to and identification of flood-prone areas and the application of criteria for land management and use, including criteria derived from data reflecting new developments that may indicate the desirability of modifying elevations based on previous flood studies[.]”⁹⁰

⁸⁵ NFIA § 1360(1), 82 Stat. at 587.

⁸⁶ FDPA sec. 103, 87 Stat. at 978-79, amending NFIA § 1308(c).

⁸⁷ *Id.* sec. 204(a), 87 Stat. at 983, adding NFIA § 1360(b).

⁸⁸ *Id.* sec. 204(a), 87 Stat. at 983, adding NFIA § 1360(c).

⁸⁹ *Id.* sec. 101(a), 87 Stat. at 977, amending NFIA § 1306(b)(1)(A).

⁹⁰ *Id.* sec. 206, 87 Stat. at 983.

The FDPA added to the NFIA a requirement that HUD publish flood elevation determinations in the *Federal Register* and send them to the affected community.⁹¹ It provided property owners a right to appeal to the local government and for the community to appeal to HUD.⁹² After a final HUD determination, the community has time to adopt local land use and control measures.⁹³ It provided for appeal to a federal district court as well.⁹⁴

7. *Borrowing From Treasury*

The FDPA increased the cap on borrowing from the Treasury from \$250 million in the NFIA to \$500 million, and to \$1 billion with the President's approval.⁹⁵ The FDPA also repealed an NFIA cap of \$2.5 billion on the total insurance outstanding.⁹⁶ In its place, the FDPA put a sunset date of June 30, 1977 on flood insurance.⁹⁷ Congress extended this date repeatedly,⁹⁸ most recently by Biggert-Waters, to extend the insurance through September 30, 2017.⁹⁹

8. *Erosion as a New Covered Peril*

Similar to the 1969 addition of mudslides to the NFIA's protections, the FDPA added erosion damage:

“The Congress also finds that (1) the damage and loss which may result from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels is related in cause and similar in effect to that which results directly from storms, deluges, overflowing waters, and other forms of flooding, and (2) the problems invoked in providing protection against this damage and loss, and the possibilities for making such protection available through a Federal or federally sponsored program are similar to those which exist in connection with efforts to provide protection against damage and loss caused by such other forms of flooding. It is therefore the further purpose of this title to make available, by means of the methods,

⁹¹ *Id.* sec. 110, 87 Stat. at 980, adding NFIA § 1363(a).

⁹² *Id.* sec. 110, 87 Stat. at 980 – 81, adding NFIA § 1363(b) and (c).

⁹³ *Id.* sec. 110, 87 Stat. at 981, adding NFIA § 1363(e).

⁹⁴ *Id.* sec. 110, 87 Stat. at 981, adding NFIA § 1363(f).

⁹⁵ *Id.* sec. 104, 87 Stat. at 979, amending NFIA § 1309(a).

⁹⁶ *Id.* sec. 105, 87 Stat. at 979, amending NFIA § 1319.

⁹⁷ *Id.* sec. 105, 87 Stat. at 979, amending NFIA § 1319.

⁹⁸ 42 U.S.C. § 4026, as amended repeatedly.

⁹⁹ Biggert-Waters § 100203(b), 126 Stat. at 916.

procedures, and instrumentalities which are otherwise established or a available under this title for purposes of the flood insurance program protection against damage and loss resulting from the erosion and undermining of shorelines by waves or currents in lakes and other bodies of water exceeding anticipated cyclical levels.”¹⁰⁰

Again, Congress extended the reach of the NFIP by expanding the NFIA definition of flood:

“The term ‘flood’ shall also include the collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, and all of the provisions of this title shall apply with respect to such collapse or subsidence in the same manner and to the same extent as with respect to floods described in paragraph (1), subject to and in accordance with such regulations, modifying the provisions of this title (including the provisions relating to land management and use) to the extent necessary to insure that they can be effectively so applied, as the Secretary may prescribe to achieve (with respect to such collapse or subsidence) the purposes of this title and the objectives of the program.”¹⁰¹

9. *Agency FDPA Responsibilities*

The FDPA required that several agencies, today the Agencies, “shall, in cooperation with the Secretary, issue appropriate rules and regulations to govern the carrying out of the agency’s responsibilities under this Act.”¹⁰²

E. Congress Enacted Several Flood Laws After the FDPA and Before 1994

1. Housing and Community Development Act of 1974

In 1974, Congress added a requirement that lenders subject to the Purchase Mandate notify borrowers and lessees of special flood hazards, as a condition of making, increasing, extending, or renewing loans on property in special flood hazard areas.¹⁰³

¹⁰⁰ FDPA sec. 108(a), 87 Stat. at 979-80, adding NFIA § 1302(g).

¹⁰¹ *Id.* sec. 108(b), 87 Stat. at 980, adding NFIA § 1370(c).

¹⁰² *Id.* sec. 205(b), 87 Stat. at 983, today at 42 U.S.C. § 4128(b).

¹⁰³ Housing and Community Development Act of 1974, Pub. L. No. 93-383, sec. 816(a), 88 Stat. 633, 739, adding NFIA § 1364.

This 1974 law also added the following to NFIA § 1307:

“[A]ny community that has made adequate progress, acceptable to the Secretary, on the construction of a flood protection system which will afford flood protection for the one-hundred year frequency flood as determined by the Secretary, shall be eligible for flood insurance under this title (if and to the extent it is eligible for such insurance under the other provisions of this title) at premium rates not exceeding those which would be applicable under this section [NFIA § 1307] if such flood protection system had been completed. The Secretary shall find that adequate progress on the construction of a flood protection system as required herein has been only if (1) 100 percent of the project cost of the system has been authorized, (2) at least 60 percent of the project cost of the system has been appropriated, (3) at least 50 percent of the project cost of the system has been expended, and (4) the system is at least 50 percent completed.”¹⁰⁴

Estimated risk premium rates are based on “a consideration of the risks involved[.]”¹⁰⁵ This amendment permitted risk premium rates to be estimated as if the flood protection were complete in the specified circumstances.

2. *Housing and Community Development Act of 1977*

In 1977, Congress permitted federally regulated lenders to make mortgage loans in SFHAs in communities that do not participate in the NFIP, and required the lenders to notify the borrower whether, in the event of a flood, federal disaster assistance would be available.¹⁰⁶ Congress retained the requirement that loans in SFHAs have flood insurance if available.

The law also authorized appeals of mapping a property into a special flood hazard area.¹⁰⁷

3. *Flood Functions Transferred to FEMA*

In 1979, by Executive Order President Jimmy Carter transferred HUD’s flood policy functions to the newly-created FEMA.¹⁰⁸ In 1983, Congress amended the NFIA to

¹⁰⁴ *Id.* sec. 816(b), 88 Stat. at 739, adding NFIA § 1307(e).

¹⁰⁵ NFIA § 1307(a)(1)(A), today at 42 U.S.C. § 4014(a)(1)(A)(i).

¹⁰⁶ Housing and Community Development Act of 1977, Pub. L. No. 95-128, sec. 703(a), 91 Stat. 1111, 1144, amending FDPA § 202(b).

¹⁰⁷ *Id.* sec. 704(d), 91 Stat. at 1146-47, adding FDPA § 201(e).

¹⁰⁸ Executive Order 12127, 44 Fed. Reg. 19367 (April 3, 1979).

transfer HUD responsibilities to FEMA.¹⁰⁹ This 1983 law also required FEMA to submit a plan to Congress by September 30, 1984 “a plan for bringing all communities containing flood risk zones into full program status by September 30, 1987.”¹¹⁰

4. *Housing and Community Development Act of 1987*

In 1987, Congress enacted a law that permitted insurance payments to demolish or relocate a flood-insured structure along the shore that is subject to imminent collapse or subsidence from erosion or undermining from waves exceeding anticipated cyclical levels.¹¹¹

5. *SFIP Fee for Fund Floodplain Management and Mapping*

In 1990, Congress required SFIP policyholders to pay FEMA a federal policy fee to pay for “administrative expenses incurred in carrying out the flood insurance and floodplain management programs (including the costs of mapping activities under section 1360)[.]”¹¹² It required chargeable premium rates, with the new fee, to cover the same costs.¹¹³

That is, SFIP fees pay for important floodplain management and FEMA’s flood hazard mapping. Private policies do not. We believe the Agencies should take this into consideration as part of this rulemaking to avoid neighborhood blight.

¹⁰⁹ Act of November 30, 1983, Pub. L. No. 98-181 sec. 451(d), 97 Stat. 1153, 1229, amending NFIA generally.

¹¹⁰ *Id.* sec. 451(d)(7), 97 Stat. at 1229, adding NFIA § 1360(d).

¹¹¹ Housing and Community Development Act of 1987, Pub. L. No. 100-242, sec. 544(a), 101 Stat. 1815, 1940, adding NFIA § 1306(c).

¹¹² Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, sec. 2302(e)(1)(C) and (D), 104 Stat. 1388, 1388-24, adding NFIA § 1307(a)(1)(B)(iii) and amending § 1307(a)(2).

¹¹³ *Id.* sec. 2302(e)(2)(A)(iii), 104 Stat. at 1388-24, redesignating and amending NFIA § 1308(b)(3).

F. National Flood Insurance Reform Act of 1994

In 1994, Congress enacted the National Flood Insurance Reform Act of 1994 (“NFIRA”),¹¹⁴ making significant reforms regarding flood insurance, floodplain management, and flood risk mitigation.

1. Redefined Agencies and New Rulewriting Authority

The NFIRA amended the FDPA definition of “Federal instrumentality responsible for the supervision, approval, regulation, or insuring of banks, savings and loan associations, or similar institutions[.]” The amendments replaced this unwieldy term with “Federal entity for lending regulation[.]”¹¹⁵ Originally, these agencies were the Federal Reserve, Federal Deposit Insurance Corporation (“FDIC”), Office of the Comptroller of the Currency (“OCC”), Federal Home Loan Bank Board (“FHLBB”), Federal Savings and Loan Insurance Corporation (“FSLIC”), and the National Credit Union Administration (“NCUA”).¹¹⁶ The NFIRA removed the FHLBB and FSLIC, and added the Office of Thrift Supervision (“OTS”) and the Farm Credit Administration.¹¹⁷ The law added the same (amended) definition to the NFIA, which previously had not defined either the old or the amended term.¹¹⁸ Today, both definitions omit the OTS.¹¹⁹

In addition, the NFIRA authorized FEMA and “any appropriate Federal agency” to issue any regulations necessary to carry out the NFIRA and the amendments it made.¹²⁰

2. Increased Flood Insurance Coverage

Congress, finding insufficient flood insurance coverage in place, acted to increase borrowers’ flood insurance coverage. A significant change was to authorize mortgage servicers to force-place flood insurance, at any time during the life of a loan, if a borrower who was required to have it allowed coverage to lapse.¹²¹ The Purchase Mandate is triggered when lenders “make, increase, extend, or renew” loans, but it is not

¹¹⁴ National Flood Insurance Reform Act of 1994, enacted as Title V of the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160, 2255 – 2287.

¹¹⁵ *Id.* sec. 511(a)(1), 108 Stat. at 2255, amending FDPA § 3(a)(5).

¹¹⁶ FDPA § 3(a)(5), 87 Stat. at 977.

¹¹⁷ NFIRA sec. 511(a)(1), 108 Stat. at 2255, amending FDPA § 3(a)(5).

¹¹⁸ *Id.* sec. 512(a)(3), 108 Stat. at 2256, adding NFIA § 1370(a)(9).

¹¹⁹ 42 U.S.C. § 4003(a)(5) (FDPA); 42 U.S.C. § 4121(a)(9) (NFIA).

¹²⁰ NFIRA § 583, 108 Stat. at 2287.

¹²¹ *Id.* sec. 524, 108 Stat. at 2259 – 60, adding FDPA § 102(e).

triggered at other times, such as when insurance lapses.¹²² Before Congress enacted this NFIRA provision, there had been uncertainty about whether mortgage servicers had authority to require flood insurance absent a Purchase Mandate trigger.¹²³ Congress made clear that coverage is required even absent a trigger.

Congress also increased flood insurance in other ways:

- Congress expanded the Purchase Mandate to federal agency lenders and to the GSEs.¹²⁴
- Congress generally required servicers to escrow flood insurance premiums.¹²⁵
- Congress authorized lenders to assess a flood hazard determination fee, and preempted contrary state law.¹²⁶
- Congress required FEMA to develop a standard flood hazard determination form.¹²⁷
- Congress prohibited federal disaster relief assistance in a flood disaster area for repair, replacement, or restoration of a property if the owner had received flood disaster assistance that was conditional on having flood insurance but who did not have the required insurance.¹²⁸
- Congress extended the FDPA § 102(a) ban on financial assistance relating to properties in SFHAs, where federal flood insurance is available, unless the property has flood insurance, to require the insurance “during the life of the property” rather than the life of the project, even if ownership transfers.¹²⁹

¹²² “It is the view of the Committee that the making, increasing, extension or renewal of a loan serves as a ‘tripwire’ of sorts for compliance with the flood insurance purchase requirements. In the modern mortgage marketplace, this approach makes the opportunity for compliance action by a lender increasingly likely, as borrowers obtain new loans on existing structures, for example, or refinance existing loans.” H. Rep. 103-414 (1994).

¹²³ “This requirement . . . clarifies existing servicers as one of several components in a renewed effort to ensure compliance with purchase and maintenance of federal flood insurance. The Committee has found that while some borrowers purchase flood insurance at the time of loan origination, this authority has been used sparingly because of concerns raised by lenders about its validity. Section 204 clarifies any ambiguities: the lender or servicer is now clearly authorized, and required, to purchase the insurance on behalf of the borrower who refuses to do so voluntarily, and to recover premiums and fees incurred as a result of that purchase.” H. Rep. 103-414 (1994).

¹²⁴ NFIRA sec. 522(a), 108 Stat at 2257 – 58, amending FDPA § 102(b).

¹²⁵ *Id.* sec. 523, 108 Stat at 2258 – 59, adding FDPA § 102(d).

¹²⁶ *Id.* sec. 526, 108 Stat. at 2262 – 63, adding FDPA § 102(h).

¹²⁷ *Id.* sec. 528, 108 Stat. at 2264, adding NFIA § 1365.

¹²⁸ *Id.* sec. 582(a), 108 Stat. at 2286.

¹²⁹ *Id.* sec. 582(c), 108 Stat. at 2287, amending FDPA § 102(a).

3. *Incentives for Floodplain Management and Flood Risk Mitigation*

The NFIRA put a heavy emphasis on floodplain management and on flood risk mitigation using incentives.

The law required FEMA to carry out its pre-existing Community Rating System (“CRS”), a voluntary program to encourage community floodplain management activities exceeding NFIP standards; to encourage adoption of more effective measures that protect natural and beneficial floodplain functions; to encourage floodplain and erosion management; and to promote the reduction of flood insurance losses.¹³⁰

Congress required discounted flood insurance premiums for communities participating in CRS, based on the estimated risk reduction from the voluntary measures.¹³¹ These remain in place today.¹³² We urge the Agencies to consider the effects of this rulemaking on these incentives, which can prevent neighborhood blight.

The NFIRA included flood risk mitigation incentives:

- The law repealed authority to purchase flood-damaged insured properties.¹³³
- The law terminated a 1988 program of paying under flood insurance contracts to demolish or relocate properties at risk of damage from erosion or waves.¹³⁴

Instead, the law required FEMA to provide grants to states and communities for “planning and carrying out activities designed to reduce the risk of flood damage to structures covered under contracts for flood insurance under this title.”¹³⁵ Congress included a prerequisite for these grants:

“To be eligible to receive financial assistance under this section for mitigation activities, a State or community shall develop, and have approved by the Director, a flood risk mitigation plan (in this section referred to as a ‘mitigation plan’), that describes the mitigation activities to be carried out with assistance provided under this section, is consistent with the criteria established by the Director under section 1361, and provides protection against flood losses to structures for which

¹³⁰ *Id.* sec. 541, 108 Stat. at 2268, adding NFIA § 1315(b)(1).

¹³¹ *Id.* sec. 541, 108 Stat. at 2268, adding NFIA § 1315(b)(2) and (3).

¹³² 42 U.S.C. § 4022(b)(2)

¹³³ NFIRA. sec. 551(a), 108 Stat. at 2269, repealing NFIA § 1362.

¹³⁴ *Id.* sec. 552, 108 Stat. at 2269, repealing NFIA § 1306(c); that provision was enacted in the Housing and Community Development Act of 1987, Pub. L. No. 100-242, sec. 544(a), 101 Stat. 1815, 1940 – 42 (enacted in 1988 despite the 1987 in its name).

¹³⁵ NFIRA sec. 553(a), 108 Stat. at 2270, adding NFIA § 1366(a).

contracts for flood insurance are available under this title. The mitigation plan shall be consistent with a comprehensive strategy for mitigation activities for the area affected by the mitigation plan, that has been adopted by the State or community following a public hearing.”¹³⁶

Congress directed how the grants were to be used for mitigation assistance:

“Amounts provided under this section (other than [for planning]) may be used only for mitigation activities specified in a mitigation plan approved by the Director[.]”¹³⁷

Congress directed that FEMA only approve mitigation plans for activities that “are technically feasible and cost-effective” and cost-beneficial.¹³⁸ Congress directed FEMA to prioritize “activities for repetitive loss structures and structures that have incurred substantial damage.”¹³⁹

Congress authorized FEMA to approve mitigation plans for several activities:

- To demolish or relocate coastal structures subject to imminent collapse or subsidence from erosion or flooding;
- To elevate, relocate, demolish, or floodproof structures in special flood hazard areas or in other areas of flood risk;
- For state and community acquisition of properties in special flood hazard areas or in other areas of flood risk, or properties substantially damaged by flood, consistent with sound land management and use;
- Minor physical mitigation efforts that do not duplicate flood prevention activities of other federal agencies and that lessen the frequency or severity of flooding and decrease predicted flood damages, but not major flood control projects unless FEMA determines they are the most cost-effective mitigation activities for the National Flood Mitigation Fund;
- Beach nourishment activities;
- Providing technical assistance by states to communities and individuals; and
- Other activities specified in a FEMA regulation or described in a state or community mitigation plan.¹⁴⁰

¹³⁶ *Id.* sec. 553(a), 108 Stat. at 2270, adding NFIA § 1366(c).

¹³⁷ *Id.* sec. 553(a), 108 Stat. at 2271, adding NFIA § 1366(e)(1).

¹³⁸ *Id.* sec. 553(a), 108 Stat. at 2271, adding NFIA § 1366(e)(2).

¹³⁹ *Id.* sec. 553(a), 108 Stat. at 2271, adding NFIA § 1366(e)(4).

¹⁴⁰ *Id.* sec. 553(a), 108 Stat. at 2271-72, adding NFIA § 1366(e)(5). NFIRA sec 554, 108 Stat. at 2273-74, created the National Flood Mitigation Fund, separately from the National Flood Insurance Fund.

4. *SFIPs Cover Increased Cost of Compliance*

Significant to this rulemaking, Congress authorized NFIP insurance to cover the cost of compliance with land use and control measures for repetitive loss structures, properties where flood damage repair costs exceed half of the structure value at the time of flood, and for properties that have flooded more than once.¹⁴¹ Congress added a surcharge up to \$75 on each insurance policy for this cost of compliance coverage.¹⁴² This so-called ICC (increased cost of compliance) coverage provides policyholders in special flood hazard areas up to \$30,000¹⁴³ to help pay the costs to bring their home or business into compliance with their community's floodplain ordinance after a flood.¹⁴⁴

This is significant to the present rulemaking because private policies, under the proposal, could apparently meet the Purchase Mandate even if they do not provide ICC coverage. The Agencies have not addressed the impact of reduced ICC coverage on communities after a flood. We believe the Agencies should address the potential for neighborhood blight in the absence of ICC coverage.

5. *Improved Flood Hazard Mapping*

Just as it had been doing since the country's earliest federal flood policies, in the NFIRA Congress emphasized improved flood hazard mapping. The law created an interagency Flood Insurance Task Force,¹⁴⁵ a Task Force on Natural and Beneficial Functions of the Floodplain,¹⁴⁶ and a Technical Mapping Advisory Council.¹⁴⁷

The law required FEMA:

- To assess the need to revise and update all floodplain areas and flood risk zones at least every five years.
- To update them as necessary, or on request of any state or local government that submits sufficient technical data justifying the request and that agrees to fund an amount FEMA determines, but not more than half of the cost of the requested revision or update.

¹⁴¹ NFIRA sec. 555(a), 108 Stat. at 2274, redesignating and amending NFIA § 1304(b).

¹⁴² *Id.*

¹⁴³ FEMA's [Increased Cost of Compliance Coverage](#) webpage.

¹⁴⁴ *Id.*

¹⁴⁵ NFIRA sec. 561, 108 Stat. at 2275.

¹⁴⁶ *Id.* sec. 562, 108 Stat. at 2276.

¹⁴⁷ *Id.* sec. 576, 108 Stat. at 2280.

- To make flood insurance rate maps available free of charge to several federal regulators, to state agencies directly responsible for coordinating the NFIP and to appropriate representatives of NFIP communities, and at a reasonable cost to all others.
- To publish any changes to flood insurance maps, and to publish compendia of all changes every six months.¹⁴⁸

6. *Capped Flood Insurance Premiums*

The NFIRA made permanent a cap on premiums for federal flood insurance. Specifically, Congress had capped premium increases at ten percent per year several times for several periods. The NFIRA capped increases in chargeable premiums for properties with a single risk classification at ten percent per year.¹⁴⁹

G. *2004 Expansion of Increased Cost of Compliance Coverage*

In 2004, Congress expanded the increased cost of compliance coverage provisions.¹⁵⁰ The coverage had been available to pay for “compliance” with land use and control measures. This was broadened to cover implementing measures consistent with land use and control measures.¹⁵¹ Coverage continued to be permitted for substantially damaged structures, but the requirement that the damage exceed half the property value was repealed.¹⁵² Coverage was also permitted for properties for which an offer of mitigation assistance is made under the Flood Mitigation Assistance Program, the Repetitive Loss Priority Program and Individual Priority Property Program, the Hazard Mitigation Grant Program, and the Predisaster Hazard Mitigation Program.¹⁵³

¹⁴⁸ *Id.* sec. 575, 108 Stat. at 2278-79, adding NFIA § 1360(e) through (j).

¹⁴⁹ *Id.* sec. 572(a)(2), 108 Stat. at 2277 –78, adding NFIA § 1308(e).

¹⁵⁰ Bunning-Bereuter-Blumenauer Flood Insurance Reform Act of 2004, Pub. L. No. 108-264, 118 Stat. 712.

¹⁵¹ *Id.* sec. 105(a)(1) and (3), 118 Stat. at 723, amending NFIA § 1304(b).

¹⁵² *Id.* sec. 105(a)(2), 118 Stat. at 723, amending NFIA § 1304(b)(2).

¹⁵³ *Id.* sec. 105(a)(4), 118 Stat. 712, 723, adding NFIA § 1304(b)(4).

H. The Biggert-Waters Act

In 2012, Congress enacted the Biggert-Waters Act. This legislation introduced major flood reforms, not the least of which was to require more actuarial NFIP flood insurance premiums. Among other things, this law was intended:

“to increase the role of private markets in the management of flood insurance risk”¹⁵⁴

“to achieve reforms to improve the financial integrity and stability of the program,”¹⁵⁵ and

to “reduce the burden on taxpayers, and facilitate the creation of a private market that eliminates taxpayer risk over the long-term.”¹⁵⁶

Again, Congress called for significant new mapping efforts,¹⁵⁷ and mitigation efforts too numerous to detail here.

1. Subsidy Reductions and Repeals

Biggert-Waters was notable for reducing and repealing the subsidies for flood insurance premiums. It did so by making the premiums risk-based in several ways, including the following:

- In estimating risk premium rates, Biggert-Waters required FEMA to consider “all costs, as prescribed by principles and standards of practice in ratemaking adopted by the American Academy of Actuaries and the Casualty Actuarial Society[.]”¹⁵⁸ The law also required the estimated risk premium rates to be to be “adequate, on the basis of accepted actuarial principles, to cover the average historical loss year obligations incurred by the” NFIP insurance fund,¹⁵⁹ including catastrophic loss years, in accordance with generally accepted actuarial principles.¹⁶⁰
- Biggert-Waters phased out rates below the risk premium rate for severe repetitive loss properties; properties for which insurance claims had been paid in excess of

¹⁵⁴ H. Rep. No. 112-102 at 1 (2011).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 21.

¹⁵⁷ Biggert-Waters secs. 100215, 100216, 100218 – 100221, 126 Stat. at 924 – 934.

¹⁵⁸ *Id.* sec. 100205(b)(3), 126 Stat. at 918, adding NFIA § 1307(a)(1)(B)(iii).

¹⁵⁹ *Id.* sec. 100211(2)(E), 126 Stat. at 921, adding NFIA § 1308(b)(5).

¹⁶⁰ *Id.* sec. 100211(3), 126 Stat. at 921, adding NFIA § 1308(i).

- the property value; commercial properties; and properties that, after enactment, incurred substantial damage or were substantially improved.¹⁶¹
- The law prohibited rates below the risk premium rates for insurance: on properties not insured on the date Biggert-Waters was enacted; on properties purchased after that date; after the property owner allowed a policy to lapse; or for owners who declined mitigation assistance offers.¹⁶²
 - Biggert-Waters doubled a cap on annual premium increases from ten percent to 20 percent.¹⁶³

2. “Shall Accept” and the Definition of Private Flood Insurance

As to private insurance, Biggert-Waters did two things. First, it required that regulated lending institutions, federal agency lenders, and the GSEs “shall accept” private flood insurance to meet the Purchase Mandate.¹⁶⁴ Second, it defined the private flood insurance that meets the Purchase Mandate as largely the same as an SFIP.¹⁶⁵

For noncommercial loans, private policies meet the Biggert-Waters definition of private flood insurance when all of the following conditions are met:

- The insurer is licensed, admitted, or otherwise approved to sell insurance in the state where the insured property is.¹⁶⁶
- The policy provides coverage “at least as broad” as an SFIP, “including when considering deductibles, exclusions, and conditions offered by the insurer[.]”¹⁶⁷
- The policy requires the insurer to give 45 days notice of cancellation or non-renewal to the insured and the lender¹⁶⁸ and the policy includes information about SFIPs.¹⁶⁹
- The policy includes “a mortgage interest clause similar to the clause contained in” an SFIP.¹⁷⁰

¹⁶¹ *Id.* sec. 100205(a)(1)(A), 126 Stat. at 917, amending NFIA § 1307(a)(2).

¹⁶² *Id.* sec. 100205(a)(1)(B), 126 Stat. at 917, adding NFIA § 1307(g).

¹⁶³ *Id.* sec. 100205(c)(2)(B), 126 Stat. at 918, amending NFIA § 1308(e).

¹⁶⁴ *Id.* secs. 100239(a)(1)(C); (a)(2)(B); and (a)(3), 126 Stat. at 958 – 59, adding FDPA § 102(b)(1)(B); amending FDPA § 102(b)(2); and amending FDPA § 102(b)(3).

¹⁶⁵ Biggert-Waters sec. 100239(a)(4), 126 Stat. at 959 – 60, adding, among other provisions, FDPA § 102(b)(7).

¹⁶⁶ *Id.* sec. 100239(a)(4), 126 Stat. at 960, adding FDPA § 102(b)(7)(A)(i), 42 U.S.C. § 4012a(b)(7)(A)(i).

¹⁶⁷ *Id.* sec. 100239(a)(4), adding FDPA § 102(b)(7)(B), 42 U.S.C. § 4012a(b)(7)(B).

¹⁶⁸ *Id.* sec. 100239(a)(4), adding FDPA § 102(b)(7)(C)(i), 42 U.S.C. § 4012a(b)(7)(C)(i).

¹⁶⁹ *Id.* sec. 100239(a)(4), adding FDPA § 102(b)(7)(C)(ii), 42 U.S.C. § 4012a(b)(7)(C)(ii).

¹⁷⁰ *Id.* sec. 100239(a)(4), adding FDPA § 102(b)(7)(C)(iii), 42 U.S.C. § 4012a(b)(7)(C)(iii).

- The policy contains “cancellation provisions that are as restrictive as” those in an SFIP.¹⁷¹

Taken together, the “shall accept” language and private insurance definition require acceptance of private flood insurance as long as the private insurance is similar to SFIP policies. Lenders, federal agency lenders, and the GSEs do not need to accept private insurance that, for example, has an unreasonably high deductible, that excludes perils that SFIP covers, or that does not name the lender or servicer as an additional loss payee.

I. Homeowner Flood Insurance Affordability Act of 2014

As FEMA began to implement the Biggert-Waters premium increases in 2013, the outcry was vehement. Congress quickly enacted the Homeowner Flood Insurance Affordability Act of 2014¹⁷² (“HFIAA”) to roll back the premiums increases generally.¹⁷³ It did not, however, amend the Biggert-Waters “shall accept” language or its definition of private flood insurance.

The HFIAA imposed premium surcharges on all NFIP insurance policies, \$25 for policies on a primary residence and \$250 for other policies.¹⁷⁴ The funds go to the National Flood Insurance Reserve Fund.¹⁷⁵ Private policies have no such surcharge. We believe the Agencies should consider how this rulemaking might affect FEMA’s ability to make up for any lost surcharges.

III. H.R. 2901 WOULD REMOVE NECESSARY PROTECTIONS

In 2016, the House, but not the Senate, passed a bill, H.R. 2901, that would amend the Biggert-Waters definition of private flood insurance policies by removing the requirement that private policies, under the definition, must be similar to SFIPs. It would not, however, repeal the Biggert-Waters requirement that federal agency lenders and the GSEs “shall accept” private policies. (It would repeal the requirement that mortgage lenders regulated by the Agencies accept private flood insurance.) In combination, these two amendments would permit homeowners to purchase inexpensive but insufficient insurance, and would require agencies, including the GSEs, to accept that insurance coverage.

¹⁷¹ *Id.* sec. 100239(a)(4), adding FDPA § 102(b)(7)(D), 42 U.S.C. § 4012a(b)(7)(D).

¹⁷² Pub. L. No. 113-89, 128 Stat. 1020.

¹⁷³ HFIAA secs. 3 – 6, 12, 14, 128 Stat at 1021 – 23 and 1025 – 26, among other things, amending the NFIA.

¹⁷⁴ *Id.* sec. 8(a), 128 Stat. at 1023 – 24, adding NFIA § 1308A.

¹⁷⁵ *Id.* sec. 8(b), 128 Stat. at 1024, adding NFIA § 1310A(c)(4).

Mortgage servicers, acting on behalf of mortgage investors, including the GSEs, ensure that appropriate flood insurance policies remain in place, on properties in flood hazard areas where insurance is available, over the life of the mortgage loan. This is important because it ensures that in the event of a flood or other damage, the consumer's property is covered and repaired. Servicers have several procedures for making sure a property has, and benefits from, appropriate insurance:

- Throughout the life of the loan, servicers review insurance policies to make sure they cover appropriate perils and have reasonable deductibles. If not, servicers require additional protection.
- Servicers ensure that the insurance provider will be able to pay claims should they occur. If a borrower selects an insurer that lacks sufficient financial strength, servicers require the borrower to change insurers.
- If there is a claim, servicers, named as a loss payee on the insurance policy, require that the proceeds are used to repair the property. If the claim is a significant dollar amount, the servicer holds the proceeds and disburses them as repair work progresses.

H.R. 2901 would interfere with each of these sensible protections. This was not the intent of the legislation, but it would be the effect unless the language is amended.

Promoting private flood insurance does not require permitting insufficient insurance. Private flood insurance and reasonable protections do, and should continue to, work hand-in-hand.

If enacted, H.R. 2901 would have amended the definition of private flood insurance for new loans, as well as for loans originated before enactment of the legislation. For new loans, even though the lender requires adequate flood insurance coverage at origination, when the policy renews, the consumer could switch to a private policy that did not adequately insure the property. The GSEs would not have been able to reject the policy. For pre-existing GSE loans, consumers would have a new statutory right to purchase private flood insurance coverage that would have been sufficient to protect the collateral backing the loan. In addition, the GSEs would not have been able to require that the mortgage servicer, operating on behalf of the GSEs, to be named as additional loss payees. This would have meant that consumers would receive the insurance proceeds directly and might have an incentive to abandon the damaged property and keep the insurance proceeds.

Under this legislation, widespread private policies would have reduced the incentives for communities to participate in the NFIP, and retain and enforce sensible floodplain

management practices. The bill did not address the effects of reducing this incentive, nor did it contain any alternative incentive.

IV. COMMENTS on the PROPOSED REGULATION

A. Difficulty of Determining Whether Private Insurance Meets the Biggert-Waters Definition

Private insurers that want to sell, and mortgage investors, lenders, and servicers that want to accept, private flood insurance are faced with the difficulty of determining whether a private policy meets the Biggert-Waters definition. This is a significant hurdle because an SFIP takes 26 pages to detail what it does and does not cover. It has several features that make it very difficult to determine whether a private policy is sufficiently similar.

One significant difference between SFIPs and private policies is that SFIPs are not subject to state law. They provide:

“This policy and all disputes arising from the handling of any claim under the policy are governed exclusively by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001, et seq.), and Federal common law.”¹⁷⁶

Private insurance is governed by state law. SFIPs also differ from private policies in that private insurers cannot avail themselves of sovereign immunity or preemption of state law. Private insurance litigation may be conducted in state court but litigation against FEMA under an SFIP must be in Federal court.¹⁷⁷ It is difficult to determine that a private policy is as broad as SFIPs given these differences.

B. Compliance Aid

The Agencies propose a compliance aid to help determine whether a private flood insurance policy meets the Biggert-Waters definition of private flood insurance. The proposed compliance aid has three required components:

- A private flood insurance policy must include or be accompanied by a written summary demonstrating how the policy meets the definition of private flood insurance by identifying the policy provisions that meet each criterion in the definition, and by confirming that the insurer is regulated in accordance with that

¹⁷⁶ SFIP § IX.

¹⁷⁷ *Id.* § VII r.

definition.

- The lender or servicer must verify in writing that the policy includes the provisions the insurer identified in the summary.
- The policy states that it meets the statutory private flood insurance definition.

We certainly appreciate the Agencies' efforts to assist with the difficulties in comparing SFIPs with private policies. We request confirmation that, even if a policy does meet the statutory definition, investors, lenders, and servicers may reject the policy if it is inadequate for any safety and soundness reason. It would not be reasonable to construe the Biggert-Waters Act as requiring any unsafe or unsound mortgage practice, and we do not believe the Agencies proposed to require any unsafe or sound practice.

C. Proposed Discretionary Acceptance of Private Policies

The Agencies propose to permit lenders and servicers discretion to meet their Purchase Mandate with private flood insurance that meets the Biggert-Waters definition, or that does not meet the that definition as long as the private policies have certain protections. For consumer loans, the proposal would permit private policies that differ from the statutory definition in the following ways:

Statutory Definition	Proposal
The policy must contain a mortgage interest clause similar to the clause contained in an SFIP. ¹⁷⁸	The policy must cover the mortgagor(s) and mortgagee(s) as loss payees.
The policy must contain cancellation provisions that are as restrictive as the provisions contained in an SFIP. ¹⁷⁹ The policy must require the insurer to give 45 days notice of cancellation or nonrenewal to the borrower and servicer, and notice to the borrower of the availability of NFIP insurance. ¹⁸⁰	The policy must provide for cancellation following reasonable notice to the borrower only for reasons permitted for SFIPs, in any case of nonpayment, and when mandated by state law.
The policy must provide coverage that is at least as broad as SFIP coverage, including when considering deductibles, exclusions, and conditions. ¹⁸¹	The policy must either: <ul style="list-style-type: none"> • Define flood as in an SFIP, and contain coverage provisions as in an

¹⁷⁸ 42 U.S.C. § 4012a(b)(7)(C)(iii).

¹⁷⁹ 42 U.S.C. § 4012a(b)(7)(D).

¹⁸⁰ 42 U.S.C. § 4012a(b)(7)(C)(i) and (ii).

¹⁸¹ 42 U.S.C. § 4012a(b)(7)(B).

Statutory Definition	Proposal
	<p>SFIP, including building coverage and personal property coverage if purchased; other coverages; and cover the increased cost of compliance; or</p> <ul style="list-style-type: none"> • Provide coverage that is similar to SFIP coverage, including when considering deductibles, exclusions, and conditions. The lender or servicer would need to document a reasonable determination that the private policy provides “sufficient protection of the loan[.]”

The Agencies request comment on (1) whether the phrase “sufficient protection of the loan” is adequately clear, (2) whether the proposed criteria for discretionary acceptance of private policies raise any safety and soundness risks for regulated lending institutions, and (3) whether the proposed criteria raise any consumer protection issues.

We believe the phrase “sufficient protection of the loan” is adequately clear for mortgage investors, lenders, and servicers, who have a strong interest in protecting their collateral. Discretionary acceptance necessarily means discretionary rejection, meaning that investors, lenders, and servicers are free to reject policies that provide insufficient coverage for the loans. This ability to reject coverage that is insufficient is a safety and soundness protection. We do not believe the proposal raises any consumer protection issues because flood insurance that protects mortgaged property, for consumers whose homes are in SFHAs, is a consumer protection, and has been required for years.

However, the Agencies do not ask whether the proposal raises any broader flood policy concerns. We believe the Agencies should address this possibility.

- It does not appear that the Agencies have addressed the fact that if private insurance were widely available, communities would have less incentive to require and enforce floodplain management practices of the NFIP. If private insurance will reduce this incentive, an alternative incentive will be necessary.
- The Agencies’ proposal would apparently permit meeting the Purchase Mandate through private policies that do not provide ICC coverage. This could mean that in the event of a flood, homeowners might not be able to restore their properties to meet the applicable standards.
- It does not appear that the Agencies have weighed the fact that FEMA insurance fees support flood protections other than flood insurance, including mapping and

floodplain management activities. These are critical to preventing flood damages. If private insurance would decrease FEMA's funding, Congress will need to provide alternate funding.

Congress requires the Agencies to consider flood policy concerns other than merely flood insurance. The FDPA requires that several agencies, including agencies that regulate financial institutions, "shall, in cooperation with the Administrator, issue appropriate rules and regulations to govern the carrying out of the agency's responsibilities under this Act."¹⁸² That is, Congress directed the Agencies to consider all of their responsibilities under the FDPA.

In addition to their FDPA rulewriting responsibilities, the NFIRA authorized the Agencies to issue regulations to carry out the applicable provisions of, and amendments made by, the NFIRA.¹⁸³ Some of those NFIRA amendments are to the NFIA, meaning the Agencies have responsibilities to carry out NFIA purposes as well as FDPA purposes. The NFIRA amendments to the NFIA included the creation of ICC coverage.¹⁸⁴ We believe the Agencies should address ICC coverage beyond the context of flood insurance in isolation. The NFIRA amendments to the NFIA also include incentives, in the form of reduced flood insurance premiums, for communities to adopt and enforce measures that reduce the risk of flood and erosion damage, and in communities that have implemented measures that protect natural and beneficial floodplain functions.¹⁸⁵ These incentives are to promote measures that will reduce flood damages. We believe the Agencies should consider the potential impact of their rulemaking on these incentives.

We believe it is critical for the Agencies to conduct a flood insurance rulemaking with thorough consideration of all NFIA, FDPA, NFIRA, and other flood policies, protections, and incentives. We urge the Agencies to consider the effects of this rulemaking on all aspects of flood policies to help prevent unintended neighborhood blight.

V. CONCLUSION

Congress will need to reauthorize NFIP flood insurance in 2017. This provides an opportunity for the Agencies and FEMA to work with Congress to improve flood policies broadly.

Flood hazard mapping prevents development in areas that are only later discovered to be

¹⁸² FDPA § 205(b), 87 Stat. at 983, as amended, 42 U.S.C. § 4128(b).

¹⁸³ NFIRA § 583, 108 Stat. at 2281, 43 U.S.C. § 4001 note.

¹⁸⁴ *Id.* sec. 555(a)(2), 108 Stat. at 2274, adding NFIA § 1304(b), today at 42 U.S.C. § 4011(b).


¹⁸⁵ *Id.* sec. 541(2), 108 Stat. at 2268 –69, adding NFIA § 1315(b), today at 42 U.S.C. § 4022(b).

at risk of floods. Mapping can prevent floods from destroying buildings, and can prevent people from occupying flood-prone land. Prevention is certainly preferable to putting lives and property at risk. Unfortunately, the lack of mapping has been a chronic problem in flood policy in this country for the past century. We urge the Agencies and FEMA to ensure adequate funding for mapping. Private firms today, building on FEMA maps, provide flood mapping services, and it may be faster or less expensive for FEMA to contract out its mapping functions.

Reauthorization also provides an opportunity for the Agencies and FEMA to work with Congress to address incentives for NFIP participation, including its important floodplain management and mitigation practices. Sound flood practices are too critical to ignore.

We appreciate the Agencies efforts in this joint rulemaking, and we also appreciate your consideration of our comments. We look forward to working with you in 2017 on these difficult issues.

Sincerely,



Anne C. Canfield
Executive Director

Cc: The Honorable W. Craig Fugate, Administrator, Federal Emergency Management Agency